property, it seems to be settled that such a transfer can be questioned by no one but the State. From this it is assumed that only the State can interfere in the carrying out of a devise. But why is it that a grantor cannot question his grant? He has seen fit to pass his property out of his own hands into the hands of the corporation, and he cannot afterwards be heard to say that the corporation was not capable of receiving the property. The law so far recognizes the existence of the corporation's power to take the grant, that it will not interfere to undo for the benefit of an individual that which the individual has voluntarily done. One should not say, perhaps, that the grantor is estopped from questioning the grant, because the elements of a true estoppel are lacking; but one can say that where such a transaction is executed, where everything has passed between the parties themselves, and all is completed, the law will not move itself to disturb the *status quo*.

When it comes to giving effect to a devise, the law is put in a far different position. Instead of being allowed to stay its hand, it is asked to take an active part in transferring to a creature of its own making property which it has forbidden that creature to take. Before, the transaction had been executed, and the law chose not to disturb it; now, the property has yet to pass to the corporation, and the law is called upon to declare positively that it shall so pass. That the law should, as in this second instance, refuse to take part in a forbidden act, appears to be in accordance with both the dignity of the judiciary and the intention of the legislature.

Whenever the question comes up before the Supreme Court of the United States for a decision, an interesting circumstance will be that the judge who delivered the opinion in the *McGraw* case was Mr. Justice Peckham.

CUSTODY OR POSSESSION. — In *Holebrook* v. *State*, 18 S. R. 109, the Supreme Court of Alabama seems not to distinguish between possession and custody. The indictment was for larceny. The prosecuting witness hired the defendant to convey him to a railroad station. Arriving there, he left with the defendant a quilt, which the defendant agreed to return to the house of the witness. Instead, the defendant sold it. The court sustained the verdict of guilty, on the ground that the defendant was not given possession, but mere custody.

The court recognizes the established rule of the common law that there is no larceny without trespass to possession, but takes it for granted that the defendant received only custody of the property. The reason for this assumption is not clear, unless it can be gathered from a passage from Rosc. Cr. Ev. § 646, which the court quotes without comment. This is merely a statement of the rule that, where a master delivers goods to a servant, the servant has only the custody of the goods. Obviously, it has no bearing on the case under consideration. Here, though it is often difficult to determine just what are the limitations of the doctrine of master and servant, there was obviously no such relation. The defendant was exactly in the position of a private carrier, and as such received the possession, not the custody, of the property. Doubtless the court was moved by the fact that, whether the defendant was convicted of larceny or embezzlement, his penalty would be practically the same, and to avoid further litigation sustained the conviction of larceny. But this seems no excuse for direct departure from principle. It was to cover just such cases as this that the Statute

of Embezzlement was passed in England, under which a prisoner, who would escape under the technicalities of the law of larceny, might be convicted. See 6 HARVARD LAW REVIEW, 244.

PRESCRIPTIVE RIGHT TO COMPEL REPAIRS. — A somewhat startling proposition in the law of easements is laid down in the case of *Whittenton Manufacturing Co.* v. *Staples*, 41 N. E. R. 441 (Mass.), FIELD, C. J., HOLMES and LATHROP, JJ., dissenting. It is to the effect that, in consequence of payment by owners of land for more than twenty years of an annual sum of money toward the repair of the dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annually. The decision is based on the analogy of the duty to repair a dam to the duty to repair fences and highways. The primary conception of an easement is a right to use another's land: it is a burden imposed upon the land itself, and gives the owner of the easement a right *in rem*. The duty of the owner of the servient estate is the same as that of all other members of the community, merely to refrain from interfering with the use of the easement. Unfortunately, the law has allowed a landowner to acquire by prescription, or by grant, certain rights, which are not accurately rights in the land of another compelling a passive duty of non-interference merely, but are rights compelling positive acts by the dominus of the servient estate.

In these cases, the land is not subjected to use, but the owner, by reason of holding the land, is compelled to do positive acts. A right to compel the performance of positive acts is known as a spurious easement: and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoyment of an existing easement (*Ryder* v. *Smith*, 3 T. R. 766); and repairs to be made upon the highway by abutting owners (Bac. Abr., Highways, E.). It is doubtful if the last mentioned right was ever recognized in the United States previously to the decision in the recent case of *Middlefield* v. *Knitting Co.*, 160 Mass. 267. The question in the principal case concerns the extension of these exceptional easements. There are two strong objections. In the first place, the analogy between repairs on a dam situated on the land of a stranger and repairs to fences and highways is not complete. In each of the spurious easements noted above, acts are to be done on the servient estate; or at least, in each case the act to be done is closely bound up with the use of his land by the owner of the servient estate. But, aside from this imperfect analogy, the creation of rights in the nature of easements — varying widely, however, from the primary conception of easements, that of a subjection of the land itself — has gone far enough. It is to be regretted that such rights — anomalies at best — were ever allowed to creep into the law; and on principle they ought not to be extended beyond their present well defined limits. It is conceivable, perhaps, that strong reasons of public policy would justify the extension which the court tries to make in the present case; but Field, C. J., in his dissenting opinion, forcibly replies to arguments of this nature that "secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, ought not to be extended." With authority and reasons of public policy against the decision, it has little left to support it.

The Massachusetts court would certainly support a covenant to pay this